92-560

No.

Supreme Court, U.S.
FILED
SEP 28 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CITY OF MANHATTAN BEACH, et al.,
Petitioners,
vs.
PEGGY McMARTIN BUCKEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The opinion of the Court of Appeals for the Ninth Circuit concluded that a conspiracy to wrongfully prosecute which results in injury to the prosecuted party, ipso facto, constitutes a due process or equal protection violation thereby giving rise to a cognizable claim under 42 U.S.C. § 1983. Given the foregoing, the questions presented are:

1. Whether malicious prosecution constitutes a violation of due process for purposes of a § 1983 cause of action even where all procedural requirements of due process have been met.

2. Whether malicious prosecution constitutes a violation of equal protection for purposes of a § 1983 cause of action absent an allegation of discrimination against a member of a protected class.

3. Whether the state court's determination of probable cause at the preliminary hearing collaterally estops a malicious prosecution cause of action brought under § 1983.

LIST OF PARTIES

The parties before this court are Petitioners, City of Manhattan Beach, County of Los Angeles and Robert Philibosian and Respondent, Peggy McMartin Buckey.

Other defendants/appellees in the Ninth Circuit Court of Appeals proceeding include, Children's Institute International, Wayne T. Satz, Capital Cities/ABC. Inc., and Kathleen "Kee" MacFarlane.

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The City of Manhattan Beach, the County of Los Angeles, and Robert Philibosian hereby petition this Court for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case entered on July 1, 1992. Co-defendants Children's Institute International, Inc., Kathleen McFarlane, Capital Cities/ABC, Inc. and Wayne Satz have filed a separate petition for review of the Ninth Circuit's decision.

OPINIONS BELOW

The original and amended opinions of the United States Court of Appeals for the Ninth Circuit in Peggy McMartin Buckey v. County of Los Angeles, 957 F.2d 652, No. 90-56333, slip op. 1601 (9th Cir. February 19, 1992), amended

and reh'g denied, 968 F.2d 791, slip op. 7817 (9th Cir. July 1, 1992), are attached hereto as Appendices A and B, respectively.

JURISDICTION

On February 19, 1992 the United States Court of Appeals for the Ninth Circuit filed its decision in Peggy McMartin Buckey v. County of Los Angeles, No. 90-56333, slip op. 1601 (9th Cir. February 19, 1992). The City of Manhattan Beach, County of Los Angeles and Robert Philibosian filed timely petitions for rehearing and suggestions for rehearing en banc. Other defendants filed similar motions. The court denied the defendants' petitions for rehearing, rejected the suggestions for rehearing en banc and amended its opinion on July 1, 1992.

slip op. at 7817. This petition is timely pursuant to Sup. Ct. R. 13.4.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The text of 42 U.S.C. §§ 1983, and 1985(3) and the Fourteenth Amendment to the United States Constitution are set forth in the Appendix.

STATEMENT OF THE CASE

Respondent/Plaintiff, Peggy McMartin Buckey, was a teacher at the McMartin Pre-school in Manhattan Beach, California. She was indicted by the Los Angeles County Grand Jury in March of 1984, for the molestation of certain McMartin Pre-school children. An eighteen-month preliminary hearing was conducted at which numerous witnesses

testified and were cross-examined. In California, the purpose of a preliminary hearing is to determine whether probable cause exists to prosecute and to weed out unwarranted prosecutions which are inspired by malicious motives.

After hearing the evidence, the California Municipal Court found there was probable cause to believe Buckey had committed various acts of child molestation. Buckey and six co-defendants were bound over for trial. The District Attorney proceeded with a three-year, highly publicized trial. Buckey was acquitted and the criminal charges were dismissed.

In the instant action, the jurisdiction of the district court was invoked by plaintiff under 42 U.S.C. § 1983 and under 28 U.S.C. §§ 1331, 1332

and 1343. Plaintiff filed her Complaint January 19, 1990 and asserted the following causes of action against the City of Manhattan Beach, County of Los Angeles and Robert Philibosian:

1. Violation of Civil Rights under 42 U.S.C. § 1983;

2. Common law conspiracy

3. Defamation

Additionally, a supplemental state malicious prosecution cause of action was alleged against other defendants.

The district court granted defendants' motions to dismiss brought pursuant to Federal Rule of Civil Procedure, Rule 12(b)(6) on the basis the § 1983 claim was barred because probable cause had been previously determined by the eighteen month preliminary hearing that led to

plaintiff's being bound over for criminal trial. The supplemental state claims were dismissed without prejudice.

The United States Court of Appeals for the Ninth Circuit found Buckey's Complaint did not state a cognizable claim but reversed and remanded to permit plaintiff to amend the Complaint. Peggy McMartin Buckey v. County of Los Angeles, No. 90-5633, slip op. 1601, 1606 (9th Cir. February 19, 1992) (Appendix A). The court found the plaintiff could possibly state a cognizable claim under 42 U.S.C. § 1983 based upon a denial of equal protection and substantive due process. slip op. at 1607.

The court failed to address the contention that this malicious

prosecution action[1] is barred by the state criminal court's determination that probable cause existed to believe that plaintiff had committed the crimes for which she was charged.

Defendants filed Petitions for Rehearing and Suggestions for Rehearing en banc. The Ninth Circuit denied the Petitions on July 1, 1992 and amended its opinion to provide that its decision does not foreclose any claims for immunity from liability that can be raised by any party to the amended Complaint. Peggy McMartin Buckey v. County of Los Angeles, No. 90-56333,

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[1] Within the context of this petition, Petitioner will use the terms "malicious prosecution" and "malicious prosecution action" to refer to a criminal prosecution which has allegedly been instigated in the absence of probable cause and for improper motives.

slip. op. at 7819 (9th Cir. July 1, 1992) (Appendix B). The court again did not address the collateral estoppel issue. The court stated:

> Under the putative claim, Buckey, like the plaintiff in Bretz v. Kelman, 773 F.2d 1026, 1031 (9th Cir. 1985) (en banc), would assert that the defendants, for their various reasons, conspired to attempt to send her to jail for child molestation, in the course of which great injury was suffered by her. The claim would not be that Buckey did not receive adequate procedural protections. Rather, as pointed out earlier, the claim would be that the procedures that ultimately established Buckey's innocence were made necessary only because of a wrongful conspiracy of entities and persons acting under the color of state law. The focus would be on a denial of equal protection of the laws, a wrong quite familiar

> to those in Congress who in 1866 enacted the first civil rights act and promulgated the Fourteenth Amendment.

slip. op. at 7823-34 (footnote omitted).

Petitioners respectfully request this court grant this petition for writ of certiorari to determine the important, unresolved issue of whether pure malicious prosecution can be the basis of a 42 U.S.C. § 1983 action. Further, if such a claim is cognizable, this Court should determine whether a § 1983 malicious prosecution action based upon a denial of equal protection can be maintained absent discrimination against a member of a protected class. Moreover, this petition should be granted to determine whether a judicial determination of probable cause to believe the plaintiff committed the crimes for which she was prosecuted

collaterally estops the plaintiff from proceeding on such a claim.

ARGUMENT

I. A MERE ALLEGATION OF A WRONGFUL CONSPIRACY TO MALICIOUSLY PROSECUTE WHICH RESULTS IN INJURY TO PLAINTIFF DOES NOT CONSTITUTE A CONSTITUTIONAL VIOLATION FOR PURPOSES OF 42 U.S.C. § 1983

Under 42 U.S.C. § 1983, liability may be imposed on a defendant who acts under color of law to subject another "to the deprivation of any right, privileges, or immunities secured by the Constitution and laws." "The first inquiry in any § 1983 suit, therefore, is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.'" Baker v.

McCollan, 443 U.S. 137, 140, 99 S.Ct. 2689, 2692, 61 L.Ed.2d 433 (1979).

The opinion of the Ninth Circuit in the instant case, Peggy Buckey v. County of Los Angeles, et. al., No. 90-56333, slip op. 1601 (9th Cir. February 19, 1992), as amended and reh'g denied, slip op. 7817 (9th Cir. July 1, 1992), states that plaintiff can maintain an action brought pursuant to § 1983 if the complaint alleges a conspiracy to "subject Buckey to the hardships and injuries which she suffered". slip op. at 7823.

The Ninth Circuit acknowledges that there were no procedural due process violations in the criminal proceedings. slip op. at 7824. Rather, without any concrete analysis, the court relies upon a substantive due process/equal

protection theory which assumes the existence of a constitutional violation based solely on the extent of the alleged injury suffered by the plaintiff.

This approach is unworkable because the court fails to set forth guidelines to determine how egregious the alleged injury must be to rise to the level of a "substantive due process violation." Indeed, without any such guidelines, the Ninth Circuit elevates a state cause of action for malicious prosecution to the level of a constitutional violation for § 1983 purposes. Under the Buckey opinion, pure malicious prosecution is actionable under § 1983.

The practical effect of the decision is to sanction a cause of action under § 1983 for every criminal

defendant who is acquitted because virtually every criminal defendant who has undergone the rigors of a criminal trial can allege a conspiracy to falsely convict and resulting injury.

The decision conflicts with this Court's holding that the Fourteenth Amendment does not protect against all deprivations of liberty. Baker v. McCollan, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979). The Fourteenth Amendment only protects against deprivations of liberty accomplished without due process of law. In Baker, this Court stated:

> The Constitution does not guarantee that only the guilty will be arrested. If it did, § 1983 would provide a cause of action for every defendant acquitted -- indeed for every suspect released. Nor are the manifold procedural protections afforded criminal defendants under the Bill of

> Rights 'without limits.' Patterson v. New York, 432 U.S. 197, 208, 97 S.Ct. 2319, 2326, 53 L.Ed.2d 281 (1977). 'Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.'

Id. at 145.

This Court has never resolved the issue of whether pure malicious prosecution can be the basis for a cognizable claim under 42 U.S.C. § 1983. This Court recently denied certiorari in a case which, in part, questioned whether 42 U.S.C. § 1983 provides a cause of action for malicious prosecution. Campbell v. Brummett, ___ U.S. ___, 112 S.Ct. 2323, 119 L.Ed.2d 241 (1992) (White, J., dissenting). Several years ago, this Court rejected another opportunity to address this issue. Cerbone v. Conway, 479 U.S. 84,

107 S.Ct. 390, 93 L.Ed.2d 325 (1986), writ dismissed as improvidently granted.

Absent a decision by this Court, the lower courts will continue to apply varying rules and standards to resolve the issue. The additional issues raised in the instant case present compelling reasons to grant certiorari. The opinion creates an unworkable equal protection-substantive due process theory to support plaintiff's § 1983 malicious prosecution claim and overlooks the estoppel effect of a prior judicial determination of probable cause.

A. THE NINTH CIRCUIT'S SUBSTANTIVE DUE PROCESS APPROACH IS UNWORKABLE AND CONFLICTS WITH THE OPINIONS OF OTHER CIRCUITS

On the issue of whether malicious prosecution can form the basis for a claim pursuant to § 1983, there is "clear disagreement among the Court of Appeals". Campbell v. Brummett, ___ U.S. ___, 112 S.Ct. 2323, 2323, 119 L.Ed.2d 241 (1992) (White, J., dissenting). Not only has the Court of Appeals reached conflicting opinions, individual Circuits have not reached a uniform approach within the specific Circuit to address this issue. Thus, a

definitive resolution is required by this court.

The Third Circuit permits a malicious prosecution action under § 1983 if the plaintiff alleges the state common law elements which include an actual malice requirement. Rose v. Bartle, 871 F.2d 331 (3d. Cir. 1989); Lee v. Mihalich, 847 F.2d 66 (3d. Cir. 1988). The common law elements do not include a constitutional violation. However, this approach was rejected by the Seventh Circuit which noted "the common law tort of malicious prosecution does not give rise to a federal constitutional wrong remedied by 42 U.S.C. § 1983". Friedman v. Village of Skokie, 763 F.2d 236, 239 (7th Cir. 1985).

Another approach, used by the Fourth Circuit, is that the denial of procedural due process is sufficient to maintain a cause of action under § 1983. Goodwin v. Metts, 885 F.2d 157 (4th Cir. 1989), cert. denied, 494 U.S. 1081, 110 S.Ct. 1812, 108 L.Ed.2d 942 (1990).

The First Circuit pointed out that:

> The majority of courts require the federal plaintiff to prove the elements of malicious prosecution under state law, but also hold that only when the misuse of the legal proceedings is so egregious as to subject the individual to a deprivation of a constitutional dimension does Section 1983 provide a remedy.

Torres v. Superintendent of the Police of Puerto Rico, 893 F.2d 404, 409 (1st Cir. 1990) (citations omitted). The Torres court adopted the majority rule and held that to state a cognizable claim under § 1983, "the complaint must

assert that the malicious conduct was so egregious that it violated substantive or procedural due process rights under the Fourteenth Amendment." Id. at 409.

The Fifth Circuit recently acknowledged that it and other circuits had "flip-flopped" on whether malicious prosecution is actionable under § 1983.

> Our most recent cases have assumed that malicious prosecution violates § 1983. Not long ago, however, our court had held that torts of abuse of process (of which malicious prosecution is a branch) were not encompassed within § 1983. Mysteriously, other circuit courts seem also to have flip-flopped on the constitutional tort status of malicious prosecution . . . [t]he Supreme Court may have to decide the issue someday.

Brummett v. Camble, 946 F.2d 1178, 1180-81, n.2 (5th Cir. 1991) (citations omitted), cert denied, ___ U.S. ___, 112 S.Ct. 2323, 119 L.Ed.2d 241 (1992).

The "general rule" in the Ninth Circuit is that a malicious prosecution claim is not cognizable under 42 U.S.C. § 1983. Usher v. City of Los Angeles, 828 F.2d 556, 562 (9th Cir. 1987). The exception to this rule is that a claim is cognizable if the prosecution is conducted with the intent to deny a person equal protection or other enumerated constitutional rights. Id. at 561-62.

Even in those Circuits which require a substantive or procedural due process violation, there is no agreement as to what constitutes "egregious" or "conscience-shocking" behavior such that a violation of a constitutional dimension has been established. See Torres, 893 F.2d at 410 ("misuse of the legal process alone will not be enough

to sustain a claim"); Barnier v. Szentmiklosi, 810 F.2d 594 (6th Cir. 1987) (police officers' filing of an unwarranted assault and battery charge against plaintiff was not "conscience-shocking"); Lorch v. Borough of Parkesburg, Pa., 736 F.2d 903 (3d Cir. 1984) (malicious filing of charges in attempt to suppress plaintiff's First Amendment right to make comment concerning public officials duties was not actionable); Gunderson v. Schlueter, 904 F.2d 407, 410-11 (8th Cir. 1990) (court indicated it came close but did not find a constitutional violation in a case where the defendant created and initiated the crime and the plaintiff fell into the government's entrapment scheme).

The Court of Appeals has failed to establish a uniform approach to address malicious prosecution-based § 1983 claims. This issue is of utmost concern to law enforcement and prosecutors to guide their actions in their investigations and prosecutions of criminal suspects.

II. THE NINTH CIRCUIT'S ERRONEOUS DECISION THAT PLAINTIFF COULD SUSTAIN A CLAIM PURSUANT TO § 1983 BASED ON A CONSPIRACY TO DEPRIVE PLAINTIFF OF HER EQUAL PROTECTION RIGHTS ABSENT A DISCRIMINATORY CLASSIFICATION IS IN CONFLICT WITH OTHER CIRCUITS AND THIS COURT

The Ninth Circuit found plaintiff could state a cognizable § 1983 claim if she alleged a conspiracy between the

defendants to send her to jail which resulted in injury. slip op. at 7823-24. The court then stated that "[t]he focus would be on the denial of equal protection of the laws . . .." slip op. at 7824.

The opinion never states that Buckey would have to allege intentional discrimination against her based on membership in a protected class and Buckey has never made such an allegation. To the extent the opinion appears to create an equal protection-based malicious prosecution cause of action under § 1983 without the necessity of alleging intentional discrimination against a member of a protected class, it conflicts with opinions of other circuits, other Ninth Circuit opinions and this Court's

opinion in Griffin v. Breckenridge, 403 U.S. 88, 102, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971).

"Equal protection doctrine arose from the Fourteenth Amendment, whose original purpose was to protect black Americans from the reigning system of Jim Crow. Consequently, equal protection doctrine most strongly protects identifiable racial and ethnic groups from legislative and administrative classifications based on race or ethnicity." Hynson v. City of Chester Legal Dept., 864 F.2d 1026, 1029 (3d Cir. 1988)

Equal protection usually is recognized as a basis for a § 1983 claim in circumstances involving racial discrimination. See Phelps v. Witchita Eagle-Beacon, 886 F.2d 1262, 1269 (10th

Cir. 1989); Harris v. Harvey, 605 F.2d 330, 338 (7th Cir. 1979), cert. denied, 445 U.S. 938, 100 S.Ct. 1331, 63 L.Ed. 2d 772 (1980). "To state a claim under the Equal Protection Clause, a § 1983 plaintiff must allege that a state actor intentionally discriminated against the plaintiff because of a membership in a protected class." Henry v. Metropolitan Sewer Dist., 922 F.2d 332, 341 (6th Cir. 1990) (quoting Johnson v. Morel, 876 F.2d 477, 479 (5th Cir. 1989) (en banc)).

Under a companion statute, 42 U.S.C. § 1985(3), this Court held that to claim a violation of the right to equal protection, plaintiff must allege the unconstitutional act was motivated by some racial or class-based, invidious, discriminatory animus.

Griffin v. Breckenridge, 403 U.S. 88, 102, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971).

Prior Ninth Circuit decisions which have used an equal protection analysis to support malicious prosecution type claims brought under § 1983 involve racial or other invidious discrimination. Usher v. City of Los Angeles, 828 F.2d 556, 562 (9th Cir. 1987) (plaintiff's allegation that the officers used racial slurs demonstrated the necessary racial animus); Karim-Panahi v. Los Angeles Police Dept., 839 F.2d 621, 624 (9th Cir. 1988) (actions taken by the defendants were allegedly motivated by plaintiff's "national origin, religion, race and political views.")

The "central purpose" behind the Fourteenth Amendment's equal protection clause is to prevent racial discrimination by government officials. Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). The Buckey opinion opens the door to heretofore unrecognized equal protection claims with no guidance or limitation.

III. THE NINTH CIRCUIT'S FAILURE TO RECOGNIZE THAT PLAINTIFF'S CLAIM IS BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL IS ERRONEOUS AND DIRECTLY CONFLICTS WITH THIS COURT'S AND OTHER CIRCUIT'S DECISIONS

Even if this Court accepts the Ninth Circuit's substantive due process/equal protection approach to

malicious prosecution actions brought under § 1983, the putative claim is barred by the state court's determination of probable cause.

The Ninth Circuit described the respondent's putative claim as follows:

> Under the putative claim, Buckey, like the plaintiff in Bretz v. Kelman, 773 F.2d 1026, 1031 (9th Cir. 1985) (en banc), would assert that the defendants, for their various reasons, conspired to attempt to send her to jail for child molestation, in the course of which great injury was suffered by her.

slip op. at 1607 and 7823-24 (footnote omitted).[2] The language of the court

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[2] Two cases cited by the Ninth Circuit in support of the putative claim do not involve circumstances where the defendant has alleged that the plaintiff is collaterally estopped from proceeding on his claim. Mann v. City of Tucson, Dept. of Police, 782 F.2d 790, 798 (9th Cir. 1986); Bretz v. Kelman, 773 F.2d 1026, 1031

demonstrates the putative claim would be for a wrongfully motivated criminal prosecution resulting in injury to the plaintiff, i.e., a claim for malicious prosecution.

There must be a clear lack of probable cause to support a violation of substantive due process in a malicious prosecution case. Carey v. City of Fall River, 870 F.2d 40, 40 (1st Cir. 1989); Franco-DeJerez v. Burgos, 876 F.2d 1038, 1040 (1st Cir. 1989) (no violation of the Constitution occurs where the defendant has probable case to believe the plaintiff committed a crime).

(9th Cir. 1985) (en banc). Both of these cases deal primarily with an analysis of Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), which is irrelevant to the collateral estoppel issue.

"The proper inquiry in a section 1983 claim based on false arrest or misuse of the criminal process is not whether the person arrested in fact committed the offense but whether the arresting officers had probable cause to believe the person arrested had committed the offense." Dowling v. City of Philadelphia, 855 F.2d 136, 141 (3d Cir. 1988) (emphasis added).[3]

Even circuits which find that a malicious prosecution claim is cognizable under § 1983 but do not

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[3] The Ninth Circuit's confusion on this issue is revealed by its erroneous assertion that the criminal procedure "ultimately established Buckey's innocence." slip op. at 7824. The criminal trial did not establish Buckey's innocence. The most that can be said is that the prosecution failed to establish her guilt beyond a reasonable doubt.

utilize the state elements to define that action, require an absence of probable cause to state a cognizable claim. Singleton v. City of New York, 632 F.2d 185, 195 (2d Cir. 1980), cert. denied, 450 U.S. 920, 101 S.Ct. 1368, 67 L.Ed.2d 347 (1981).

The Ninth Circuit has held that to state a cognizable § 1983 claim, a plaintiff must allege the elements of malicious prosecution under California law, including "lack of probable cause"[4] and that the "malicious prosecution is conducted with the intent to deprive a person of equal protection of the laws or is otherwise intended to subject a

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[4] Under California law, the absence of probable cause is an essential element of a cause of action for malicious prosecution. Bulkley v. Cline (1962) 206 Cal.App.2d 742, 748.

person to a denial of constitutional rights." See Usher v. City of Los Angeles, 828 F.2d 556, 562 (9th Cir. 1987).

The Buckey opinion directly conflicts with this Court's mandate that state court judgments are to be given preclusive effect in actions brought under 42 U.S.C. § 1983. Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 441, 66 L.Ed.2d 308, (1980). In Allen, this Court held that where a party has a full and fair opportunity to litigate an issue in a state court proceeding, the judgment rendered in that proceeding is binding against him in a later action brought under § 1983. Id. at 101.

Under California law, the purpose of a preliminary hearing is to determine whether probable cause exists to support

the prosecution and to "weed out" "unwarranted prosecutions" which are inspired by malicious motives. Jaffe v. Stone, 18 Cal.2d 146, 150, 114 P.2d 335 (1941).

In Buckey, the Ninth Circuit acknowledged the fairness of the preliminary hearing which lasted over eighteen months and involved examination and cross-examination of numerous witnesses. "The preliminary hearing and the trial itself cannot be faulted from a procedural point of view." slip op. at 7824. Consequently, plaintiff was given a full and fair opportunity to litigate the issue of probable cause.

The preclusive effect of preliminary hearing probable cause determinations on § 1983 malicious prosecution actions has been addressed

by the Sixth and Seventh Circuits in Coogan v. City of Wixom, 820 F.2d 170 (6th Cir. 1987) and Guenther v. Holmgreen, 738 F.2d 879 (7th Cir. 1984), cert. denied, 469 U.S. 1212, 105 S.Ct. 1182, 84 L.Ed.2d 329 (1985).

In Guenther, an acquitted criminal defendant brought suit under 42 U.S.C. § 1983 against a police officer and his city employer alleging the officer arrested him without probable cause, violated his Fourth Amendment rights and deprived him of his liberty without due process of law under the Fourteenth Amendment.

The state criminal court previously determined there was probable cause to arrest and denied a motion to dismiss the criminal charges following the preliminary hearing.

The Seventh Circuit decided the plaintiff was precluded from proceeding on his substantive Fourth Amendment and due process claims and stated:

> In passing § 1983, '[Congress did not intend] to allow re-litigation after a full and fair hearing simply because the state court's decision may have been erroneous.' Allen v. McCurry, 449 U.S. at 101, 101 S.Ct. at 418. We should add that the state court's determination of probable cause estops Guenther from raising any Fourteenth Amendment due process claim based upon general tort theories of false arrest, false imprisonment, and malicious prosecution.

Guenther, 738 F.2d at 889 (emphasis added and footnote omitted).

The Sixth Circuit arrived at the same conclusion as the Guenther court on very similar facts. The state court's determination of probable cause collaterally estopped the criminal

defendant from proceeding on a claim brought under 42 U.S.C. § 1983 based upon a general theory of malicious prosecution. Coogan v. City of Wixom, 820 F.2d 170, 175 (6th Cir. 1987).

The claim proposed by the Buckey opinion as potentially cognizable under § 1983 is grounded in malicious prosecution. The absence of probable cause is a necessary element of that putative claim. The state court has already determined that probable cause existed for the prosecution. Thus, plaintiff is barred from proceeding on even the putative claim. See Allen v. McCurry, supra, 449 U.S. at 101.

The putative claim created by the Ninth Circuit conflicts with this court's decisions, other circuit court opinions, and good public policy which

promotes finality of judgments, comity and preservation of scarce judicial resources.

CONCLUSION

Based on the foregoing, Petitioners, City of Manhattan Beach, County of Los Angeles, and Robert Philibosian respectfully request this Court issue a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review its judgment in the instant case.

Respectfully Submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PEGGY MCMARTIN BUCKEY,
Plaintiff-Appellant,

v.

COUNTY OF LOS ANGELES; CITY OF MANHATTAN BEACH; ROBERT PHILIBOSIAN; CHILDREN'S INSTITUTE INTERNATIONAL; WAYNE T. SATZ; CAPITAL CITIES/ABC, INC.; KATHLEEN "KEE" MACFARLANE,
Defendants-Appellees.

No. 90-56333
D.C. No.
CV-90-0293-RG
OPINION

Appeal from the United States District Court
for the Central District of California
Richard A. Gadbois, Jr., District Judge, Presiding

Argued and Submitted
November 7, 1991—Pasadena, California

Filed February 19, 1992

Before: Joseph T. Sneed, Robert R. Beezer and
David R. Thompson, Circuit Judges.

Opinion by Judge Sneed

SUMMARY

Courts and Procedure

Reversing and remanding a district court judgment dismissing a section 1983 action with prejudice for failure to state a

claim, the court of appeals held that appellant should be permitted to amend her complaint to allege that due process was unconstitutionally denied regardless of the purity of the procedures themselves.

Appellant Peggy McMartin Buckey was acquitted of state charges in the highly publicized McMartin Preschool molestation case. She brought a section 1983 action against several individuals and entities, alleging that improper motives led them to pursue the case despite the lack of factual foundation for doing so. Her complaint stated that, without limitation, she was deprived of her rights to due process, privacy, equal protection, and a fair trial contrary to the fourteenth amendment. The district court granted the defendants' motion to dismiss for failure to state a claim. McMartin's complaint was dismissed with prejudice and with no leave to amend.

[1] The court acknowledged that, as it stood, McMartin's complaint could not survive a motion to dismiss. Thus, the issue the court confronted was whether it should remand to permit McMartin to amend her pleadings. [2] Here, there was a distinct claim cognizable in a federal court and consistent with the facts and allegations of McMartin's complaint that she might plead: That all parties described in the complaint conspired under the color of state law to subject her to the hardships and injuries that she suffered. [3] This putative claim would not be addressed to a deprivation under color of state law of procedural due process, but rather would assert that due process was unconstitutionally denied regardless of the purity of the procedures themselves. [4] To state a defamation-plus claim, McMartin must join a defamation claim to a recognizable section 1983 wrong such as the denial of equal protection and substantive due process.

COUNSEL

William H. Waysman, James H. Davis, Los Angeles, California, for the plaintiff-appellant.

Roger H. Granbo, Deputy County Counsel, Los Angeles, California, Jeffrey L. Garland, Cotkin, Collins & Franscell, Santa Ana, California, Charles P. Diamond, O'Melveny & Myers, Gregory J. Aldisert, Philip W. Boesch, Jr., Kinsella, Boesch, Fujikawa & Towle, Mark B. Helm, Munger, Tolles & Olson, Los Angeles, California, for the defendants-appellees.

OPINION

SNEED, Circuit Judge:

Peggy McMartin Buckey, acquitted in the highly publicized McMartin Preschool child molestation case, appeals the dismissal with prejudice of her 42 U.S.C. § 1983 action against the City of Manhattan Beach, Los Angeles County, Robert Philibosian, Los Angeles County District Attorney, Children's Institute International (CII), child abuse investigation specialists, Kathleen "Kee" MacFarlane, CII investigative social worker, television company Capital Cities/ABC, Inc., and ABC reporter Wayne T. Satz. Buckey alleges, in effect, that but for the policies and actions of the defendants, her life would not have been ruined by the McMartin Preschool prosecution. The trial court found that there was no possible theory under which Buckey's allegations could amount to a cognizable claim. We reverse and remand to allow Buckey to amend her pleadings.

I.

FACTS AND PROCEEDINGS BELOW

The facts, as set forth in Buckey's complaint, are as follows: Buckey co-owned and taught at the highly regarded Virginia McMartin Preschool in Manhattan Beach, California. In 1983, a person known to be paranoid and otherwise mentally ill alleged to the Manhattan Beach police that her child

had been sexually molested while attending the McMartin Preschool. The police sent letters to all McMartin Preschool parents, which resulted in a wave of unfounded abuse allegations. The ensuing city and county investigation was improperly delegated to CII, with Kee MacFarlane as principal investigator. MacFarlane had no relevant academic, professional, or technical licenses or credentials. CII and MacFarlane proceeded seriously to mishandle the investigation, so as to violate established guidelines for child abuse investigation and to cause the children to fabricate testimony and fantasize experiences of abuse that had never occurred. The County, acting through Philibosian, accepted the CII investigation as basis for launching a prosecution against Buckey and others. Meanwhile, MacFarlane leaked the story to Satz at ABC, where it was disseminated to the public.

Buckey alleges that several defendants had improper motives that led them to pursue the McMartin case despite the lack of factual foundation for doing so. CII needed to unearth a scandal to save its business from bankruptcy. Philibosian needed ammunition for an upcoming election battle. Capital Cities/ABC wanted to sell a sensational story, and was willing to go beyond the bounds of responsible journalism to do so.[1] In other words, Capital Cities/ABC created rather than simply reported the news.

After her acquittal on all criminal charges, Buckey brought this action in federal district court. She alleged section 1983 violations and pendent state law claims, and sought upwards of $1 million in damages. Her complaint stated that, without limitation, she was deprived of her rights to due process, privacy, equal protection, and a fair trial contrary to the Fourteenth Amendment. The defendants moved to dismiss under

[1]Buckey's complaint alleges a conspiracy among the City, County, CII, MacFarlane, Satz, and ABC to disclose the McMartin affair prior to Buckey's indictment. A romantic liaison between MacFarlane and Satz is asserted in Buckey's appellate brief, but not in her complaint.

Fed. R. Civ. P. Rule 12(b)(6) for failure to state a claim.[2] The trial court observed that the preliminary hearing that led to Buckey's being bound over for criminal trial had lasted 18 months. This indicated that the prosecution had probable cause for proceeding with the McMartin criminal case. The court further noted that Buckey had been acquitted, and so could not complain she had not received a fair trial. Finally, the court expressed its sympathy that Buckey was properly "very, very upset" by what had happened to her, but stated that "being very, very upset does not state a cause of action under [section] 1983." The court dismissed Buckey's section 1983 action with prejudice, denying leave to amend, and dismissed the pendent state law claims without prejudice.

II.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction pursuant to 28 U.S.C. § 1291. A dismissal for failure to state a claim is a ruling on a question of law and as such is reviewed de novo. *Kruso v. International Telephone & Telegraph Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 3217 (1990). Review is based on the contents of the complaint. *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1989). A complaint should not be dismissed under Rule 12(b)(6) "unless it appears beyond doubt that plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." *Id.* (quotation omitted). All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Id.* Civil rights complaints are to be liberally construed. *Gobel v. Maricopa County*, 867 F.2d 1201, 1203 (9th Cir. 1989).

[2]Defendant Satz did not appear at the hearing on the motions to dismiss. By stipulation of the parties, the motions to dismiss apply with the same force and effect as to Satz as to the other defendants.

III.

ANALYSIS

[1] Buckey's vague and conclusory complaint "aims in the general direction of the federal Constitution with buckshot." *Chiplin Enter. v. City of Lebanon*, 712 F.2d 1524, 1526 (1st Cir. 1983). It describes her misfortunes and the persons she believed caused them, but in no way does Buckey adequately plead injuries cognizable under section 1983. Mere negligence and self-aggrandizing motives are not actionable under section 1983. *Daniels v. Williams*, 474 U.S. 327, 333 (1986); *see, e.g., Johnson v. Barker*, 799 F.2d 1396, 1400 (9th Cir. 1986) (alleged politically motivated prosecution did not give rise to valid 1983 due process claim). Nor does the complaint allege specific facts to support the existence of a conspiracy among the defendants. *See Burns v. County of King*, 883 F.2d 819, 821 (9th Cir. 1989). As it stands, Buckey's complaint cannot survive a motion to dismiss. The only issue we confront is whether we should remand to permit Buckey to amend her pleadings.

[2] We would be justified in doing this only if there is a distinct claim cognizable in a federal court and consistent with the facts and allegations set forth in her complaint that she might plead. We believe one such claim may exist. It is that all the parties described in the complaint conspired under the color of state law to subject Buckey to the hardships and injuries which she suffered. We express no opinion on whether such a claim ethically and professionally can be filed. We only indicate that it is a possibility.

[3] This putative claim would not be addressed to a deprivation under color of state law of procedural due process, but rather would assert that due process was unconstitutionally denied "regardless of the purity of the procedures themselves." *Mann v. City of Tucson, Dept. of Police*, 782 F.2d 790, 798 (9th Cir. 1986) (Sneed, J., concurring in the

result). Because the claim would not be based in procedural due process, the question of the adequacy of post-deprivation remedies, so important in section 1983 cases involving only procedural due process deprivations, would be irrelevant. *Zinermon v. Burch*, 494 U.S. 113, 125-26 (1990); *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951, 957 (9th Cir. 1991).

Under the putative claim, Buckey, like the plaintiff in *Bretz v. Kelman*, 773 F.2d 1026, 1031 (9th Cir. 1985) (en banc),[3] would assert that the defendants, for their various reasons, conspired to attempt to send her to jail for child molestation, in the course of which great injury was suffered by her. The claim would not be that Buckey did not receive adequate procedural protections. Rather, as pointed out earlier, the claim would be that the procedures that ultimately established Buckey's innocence were made necessary only because of a wrongful conspiracy of entities and persons acting under the color of state law. The focus would be on a denial of equal protection of the laws, a wrong quite familiar to those in Congress who in 1866 enacted the first civil rights act and promulgated the Fourteenth Amendment. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 211 (1866) (describing civil rights bill S. 61: "the inhabitants of every race and color . . . shall have . . . full and equal benefit of all laws *and proceedings* for the security of persons and property, and shall be subject *to like punishment, pains, and penalties, and to none other* . . . .") (emphasis added). .

Buckey, to repeat, was afforded ample due process at the state level. She received its full benefits resulting in her

[3]The court's analysis in *Bretz* is to some extent framed in the language of procedural due process, *see id.*, and the case has been interpreted as a procedural due process case, *see, e.g., Johnson v. Barker*, 799 F.2d at 1400. However, *Bretz* was decided without the benefit of *Zinermon*'s three-prong typology of 1983 due process claims, 494 U.S. at 125-26, and it is most properly analyzed as a case involving the denial of equal protection or substantive due process.

acquittal. The preliminary hearing and the trial itself cannot be faulted from a procedural point of view.

[4] Nor can Buckey successfully urge that she suffered injury because of so-called "defamation plus" by those acting under color of state law. *See Paul v. Davis*, 424 U.S. 693 (1976). Business and reputation losses alone do not constitute the "plus" that is required to transform an ordinary defamation claim into a section 1983 claim. *Cooper v. Dupnik*, 924 F.2d 1520, 1534 (9th Cir. 1991), *reh'g en banc ordered*, 933 F.2d 798 (May 23, 1991). To state a defamation-plus claim, Buckey must join a defamation claim to a recognizable section 1983 wrong such as the denial of equal protection and substantive due process here hypothesized.

We conclude that Buckey should be given the opportunity to amend her complaint.

REVERSED and REMANDED.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PEGGY MCMARTIN BUCKEY,
Plaintiff-Appellant,

v.

COUNTY OF LOS ANGELES; CITY OF MANHATTAN BEACH; ROBERT PHILOBOSIAN; CHILDREN'S INSTITUTE INTERNATIONAL; WAYNE T. SATZ; CAPITAL CITIES/ABC, INC.; KATHLEEN "KEE" MACFARLANE,
Defendants-Appellees.

No. 90-56333

D.C. No. CV-90-0293-RG

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
Richard A. Gadbois, Jr., District Judge, Presiding

Argued and Submitted
November 7, 1991—Pasadena, California

Filed February 19, 1992
Amended July 1, 1992

Before: Joseph T. Sneed, Robert R. Beezer, and David R. Thompson, Circuit Judges.

Opinion by Judge Sneed

SUMMARY

Courts and Procedure

Reversing and remanding a district court judgment dismissing a section 1983 action with prejudice for failure to state a

claim, the court of appeals held that appellant should be permitted to amend her complaint to allege that due process was unconstitutionally denied regardless of the purity of the procedures themselves.

Appellant Peggy McMartin Buckey was acquitted of state charges in the highly publicized McMartin Preschool molestation case. She brought a section 1983 action against several individuals and entities, alleging that improper motives led them to pursue the case despite the lack of factual foundation for doing so. Her complaint stated that, without limitation, she was deprived of her rights to due process, privacy, equal protection, and a fair trial contrary to the fourteenth amendment. The district court granted the defendants' motion to dismiss for failure to state a claim. McMartin's complaint was dismissed with prejudice and with no leave to amend.

[1] The court acknowledged that, as it stood, McMartin's complaint could not survive a motion to dismiss. Thus, the issue the court confronted was whether it should remand to permit McMartin to amend her pleadings. [2] Here, there was a distinct claim cognizable in a federal court and consistent with the facts and allegations of McMartin's complaint that she might plead: That all parties described in the complaint conspired under the color of state law to subject her to the hardships and injuries that she suffered. [3] This putative claim would not be addressed to a deprivation under color of state law of procedural due process, but rather would assert that due process was unconstitutionally denied regardless of the purity of the procedures themselves. [4] To state a defamation-plus claim, McMartin must join a defamation claim to a recognizable section 1983 wrong such as the denial of equal protection and substantive due process.

COUNSEL

William H. Waysman, James H. Davis, Los Angeles, California, for the plaintiff-appellant.

Roger H. Granbo, Deputy County Counsel, Los Angeles, California, Jeffrey L. Garland, Cotkin, Collins & Franscell, Santa Ana, California, Charles P. Diamond, O'Melveny & Meyers, Gregory J. Aldisert, Philip W. Boesch, Jr., Kinsella, Boesch, Fujikawa & Towle, Mark B. Helm, Munger, Tolles & Olson, Los Angeles, California, for the defendants-appellees.

ORDER

The panel has voted to amend its opinion filed February 19, 1992, as follows:

1. In the first full paragraph on page 1608 of the slip opinion, which paragraph begins, "Nor can Buckey successfully urge . . . ," the citation "*Cooper v. Dupnik*, 924 F.2d 1520, 1534 (9th Cir. 1991), *reh'g en banc ordered*, 933 F.2d 798 (May 23, 1991)" should be changed to "*Cooper v. Dupnik*, 924 F.2d 1520, 1534 (9th Cir. 1991), *rev'd on other grounds*, Nos. 88-15661, 88-15685, slip op. at 5043 (9th Cir. May 5, 1992) (en banc)."

2. At the end of the second full paragraph on page 1608 of the slip opinion, which paragraph begins, "We conclude . . . ," add the following sentence: "Nothing in this opinion is intended to foreclose any claim of immunity from liability under section 1983 that can be raised by any party to the amended complaint of the appellant."

With the opinion so amended, the panel as constituted in the above case has voted to deny the petitions for rehearing and to reject the suggestions for rehearing en banc. The full court was advised of the suggestions for en banc rehearing, and no judge of the court requested a vote on the suggestions for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing are denied, and the suggestions for rehearing en banc are rejected.

OPINION

SNEED, Circuit Judge:

Peggy McMartin Buckey, acquitted in the highly publicized McMartin Preschool child molestation case, appeals the dismissal with prejudice of her 42 U.S.C. § 1983 action against the City of Manhattan Beach, Los Angeles County, Robert Philibosian, Los Angeles County District Attorney, Children's Institute International (CII), child abuse investigation specialists, Kathleen "Kee" MacFarlane, CII investigative social worker, television company Capital Cities/ABC, Inc., and ABC reporter Wayne T. Satz. Buckey alleges, in effect, that but for the policies and actions of the defendants, her life would not have been ruined by the McMartin Preschool prosecution. The trial court found that there was no possible theory under which Buckey's allegations could amount to a cognizable claim. We reverse and remand to allow Buckey to amend her pleadings.

I.

FACTS AND PROCEEDINGS BELOW

The facts, as set forth in Buckey's complaint, are as follows: Buckey co-owned and taught at the highly regarded Virginia McMartin Preschool in Manhattan Beach, California. In 1983, a person known to be paranoid and otherwise mentally ill alleged to the Manhattan Beach police that her child had been sexually molested while attending the McMartin Preschool. The police sent letters to all McMartin Preschool parents, which resulted in a wave of unfounded abuse allegations. The ensuing city and county investigation was improperly delegated to CII, with Kee MacFarlane as principal investigator. MacFarlane had no relevant academic, professional, or technical licenses or credentials. CII and MacFarlane proceeded seriously to mishandle the investigation, so as to violate established guidelines for child abuse investigation

and to cause the children to fabricate testimony and fantasize experiences of abuse that had never occurred. The County, acting through Philibosian, accepted the CII investigation as basis for launching a prosecution against Buckey and others. Meanwhile, MacFarlane leaked the story to Satz at ABC, where it was disseminated to the public.

Buckey alleges that several defendants had improper motives that led them to pursue the McMartin case despite the lack of factual foundation for doing so. CII needed to unearth a scandal to save its business from bankruptcy. Philibosian needed ammunition for an upcoming election battle. Capital Cities/ABC wanted to sell a sensational story, and was willing to go beyond the bounds of responsible journalism to do so.[1] In other words, Capital Cities/ABC created rather than simply reported the news.

After her acquittal on all criminal charges, Buckey brought this action in federal district court. She alleged section 1983 violations and pendent state law claims, and sought upwards of $1 million in damages. Her complaint stated that, without limitation, she was deprived of her rights to due process, privacy, equal protection, and a fair trial contrary to the Fourteenth Amendment. The defendants moved to dismiss under Fed. R. Civ. P. Rule 12(b)(6) for failure to state a claim.[2] The trial court observed that the preliminary hearing that led to Buckey's being bound over for criminal trial had lasted 18 months. This indicated that the prosecution had probable cause for proceeding with the McMartin criminal case. The court further noted that Buckey had been acquitted, and so

[1]Buckey's complaint alleges a conspiracy among the City, County, CII, MacFarlane, Satz, and ABC to disclose the McMartin affair prior to Buckey's indictment. A romantic liaison between MacFarlane and Satz is asserted in Buckey's appellate brief, but not in her complaint.

[2]Defendant Satz did not appear at the hearing on the motions to dismiss. By stipulation of the parties, the motions to dismiss apply with the same force and effect as to Satz as to the other defendants.

could not complain she had not received a fair trial. Finally, the court expressed its sympathy that Buckey was properly "very, very upset" by what had happened to her, but stated that "being very, very upset does not state a cause of action under [section] 1983." The court dismissed Buckey's section 1983 action with prejudice, denying leave to amend, and dismissed the pendent state law claims without prejudice.

II.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction pursuant to 28 U.S.C. § 1291. A dismissal for failure to state a claim is a ruling on a question of law and as such is reviewed de novo. *Kruso v. International Telephone & Telegraph Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 3217 (1990). Review is based on the contents of the complaint. *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1989). A complaint should not be dismissed under Rule 12(b)(6) "unless it appears beyond doubt that plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." *Id.* (quotation omitted). All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Id.* Civil rights complaints are to be liberally construed. *Gobel v. Maricopa County*, 867 F.2d 1201, 1203 (9th Cir. 1989).

III.

ANALYSIS

[1] Buckey's vague and conclusory complaint "aims in the general direction of the federal Constitution with buckshot." *Chiplin Enter. v. City of Lebanon*, 712 F.2d 1524, 1526 (1st Cir. 1983). It describes her misfortunes and the persons she believed caused them, but in no way does Buckey adequately plead injuries cognizable under section 1983. Mere negligence and self-aggrandizing motives are not actionable under

section 1983. *Daniels v. Williams*, 474 U.S. 327, 333 (1986); *see, e.g., Johnson v. Barker*, 799 F.2d 1396, 1400 (9th Cir. 1986) (alleged politically motivated prosecution did not give rise to valid 1983 due process claim). Nor does the complaint allege specific facts to support the existence of a conspiracy among the defendants. *See Burns v. County of King*, 883 F.2d 819, 821 (9th Cir. 1989). As it stands, Buckey's complaint cannot survive a motion to dismiss. The only issue we confront is whether we should remand to permit Buckey to amend her pleadings.

[2] We would be justified in doing this only if there is a distinct claim cognizable in a federal court and consistent with the facts and allegations set forth in her complaint that she might plead. We believe one such claim may exist. It is that all the parties described in the complaint conspired under the color of state law to subject Buckey to the hardships and injuries which she suffered. We express no opinion on whether such a claim ethically and professionally can be filed. We only indicate that it is a possibility.

[3] This putative claim would not be addressed to a deprivation under color of state law of procedural due process, but rather would assert that due process was unconstitutionally denied "regardless of the purity of the procedures themselves." *Mann v. City of Tucson, Dept. of Police*, 782 F.2d 790, 798 (9th Cir. 1986) (Sneed, J., concurring in the result). Because the claim would not be based in procedural due process, the question of the adequacy of post-deprivation remedies, so important in section 1983 cases involving only procedural due process deprivations, would be irrelevant. *Zinermon v. Burch*, 494 U.S. 113, 125-26 (1990); *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951, 957 (9th Cir. 1991).

Under the putative claim, Buckey, like the plaintiff in *Bretz v. Kelman*, 773 F.2d 1026, 1031 (9th Cir. 1985) (en banc),[3]

[3]The court's analysis in *Bretz* is to some extent framed in the language of procedural due process, *see id.*, and the case has been interpreted as a

would assert that the defendants, for their various reasons, conspired to attempt to send her to jail for child molestation, in the course of which great injury was suffered by her. The claim would not be that Buckey did not receive adequate procedural protections. Rather, as pointed out earlier, the claim would be that the procedures that ultimately established Buckey's innocence were made necessary only because of a wrongful conspiracy of entities and persons acting under the color of state law. The focus would be on a denial of equal protection of the laws, a wrong quite familiar to those in Congress who in 1866 enacted the first civil rights act and promulgated the Fourteenth Amendment. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 211 (1866) (describing civil rights bill S. 61: "the inhabitants of every race and color . . . shall have . . . full and equal benefit of all laws *and proceedings* for the security of persons and property, and shall be subject *to like punishment, pains, and penalties, and to none other* . . . .") (emphasis added).

Buckey, to repeat, was afforded ample due process at the state level. She received its full benefits resulting in her acquittal. The preliminary hearing and the trial itself cannot be faulted from a procedural point of view.

[4] Nor can Buckey successfully urge that she suffered injury because of so-called "defamation plus" by those acting under color of state law. *See Paul v. Davis*, 424 U.S. 693 (1976). Business and reputation losses alone do not constitute the "plus" that is required to transform an ordinary defamation claim into a section 1983 claim. *Cooper v. Dupnik*, 924 F.2d 1520, 1534 (9th Cir. 1991), *rev'd on other grounds*, Nos.

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procedural due process case, *see, e.g., Johnson v. Barker*, 799 F.2d at 1400. However, *Bretz* was decided without the benefit of *Zinermon*'s three-prong typology of 1983 due process claims, 494 U.S. at 125-26, and it is most properly analyzed as a case involving the denial of equal protection or substantive due process.

88-15661, 88-15685, slip op. at 5043 (9th Cir. May 5, 1992) (en banc). To state a defamation-plus claim, Buckey must join a defamation claim to a recognizable section 1983 wrong such as the denial of equal protection and substantive due process here hypothesized.

We conclude that Buckey should be given the opportunity to amend her complaint. Nothing in this opinion is intended to foreclose any claim of immunity from liability under section 1983 that can be raised by any party to the amended complaint of the appellant.

REVERSED and REMANDED.

APPENDIX C

DE WITT W. CLINTON,
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Attorneys for Defendants
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ROBERT PHILIBOSIAN

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PEGGY McMARTIN BUCKEY,	)	CASE NO. CV 90 0293 RG (GHKx)
Plaintiff,	)	ORDER
v.	)	
COUNTY OF LOS ANGELES, CITY OF MANHATTAN BEACH, ROBERT PHILIBOSIAN, CHILDREN'S	)	

INSTITUTE)
INTERNATIONAL,)
KATHLEEN "KEE")
MAC FARLANE,)
CAPITAL CITIES/)
ABC, INC., and)
WAYNE T. SATZ,)
)
Defendants.)
_____)

On August 6, 1990, in Courtroom 16 in the above-entitled court, the Motions to Dismiss Plaintiff's Complaint pursuant to the Federal Rules of Civil Procedure, Rule 12(b)(6), filed by Defendant COUNTY OF LOS ANGELES and ROBERT PHILIBOSIAN, CITY OF MANHATTAN BEACH, CHILDREN'S INSTITUTE INTERNATIONAL and KATHLEEN "KEE" MAC FARLANE, and CAPITAL CITIES/ABC, INC., came on regularly for hearing.

Appearing for Plaintiff PEGGY McMARTIN BUCKEY was William H. Waysman. Appearing for Defendants COUNTY OF LOS ANGELES and ROBERT PHILIBOSIAN was De Witt W. Clinton, County Counsel, by

Roger H. Granbo, Deputy County Counsel, and John A. Daly of Chase, Rotchford, Drukker & Bogust. Appearing for Defendant CITY OF MANHATTAN BEACH was David D. Lawrence of Cotkin, Collins & Franscell. Appearing for Defendants CAPITAL CITIES/ABC, INC. was Bradley S. Phillips and Robert N. Treiman of Munger, Tolles and Olson. Appearing for Defendants CHILDREN'S INSTITUTE INTERNATIONAL and KATHLEEN "KEE" MAC FARLANE was Lisa M. Jacobsen of O'Melveny and Meyers. There were no other appearances.

After consideration of the moving papers, the oppositions thereto, the replies to the oppositions and oral argument of counsel, the Court orders as follows:

1. Plaintiff's claim for Violation of Civil Rights under 42 U.S.C. Section

1983 is dismissed with prejudice. The Plaintiff has not stated a claim, and there is no way that the Plaintiff can state a claim that her constitutionally protected rights were violated by any of the moving Defendants.

2. Plaintiff's state claims for Common Law Conspiracy, Malicious Prosecution, and Defamation are

dismissed without prejudice as there is no longer a federal claim to which they may be appended.

IT IS SO ORDERED.

DATED: 9/27/90

RICHARD A. GADBOIS, JR.
United States District Judge

FILED SEPTEMBER 27, 1990
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY /S/ DEPUTY

I HEREBY CERTIFY THAT THIS DOCUMENTS WAS SERVED BY FIRST CLASS MAIL POSTAGE PREPAID, TO ALL COUNSEL (OR PARTIES) AT THEIR RESPECTIVE MOST RECENT ADDRESS OF RECORD IN THIS ACTION ON THIS DATE.
DATED: 9/28/92

/s/
DEPUTY CLERK

APPENDIX D

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 90-56333
CT/AG#: CV 90 0293 RG

PEGGY MCMARTIN BUCKEY,

Plaintiff-Appellant

v.

LOS ANGELES COUNTY SHERIFF; MANHATTAN BEACH CITY; ROBERT PHILIBOSIAN, CHILDREN'S INSTITUTE INTERNATIONAL; WAYNE T. SATZ; CAPITAL CITIES/ABC, INCORPORATED; KATHLEEN MACFARLANE, alias, Kee McFarlane,

Defendants-Appellees

APPEAL FROM the United States District Court for the Central District of California, Los Angeles.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the

Central District of California, Los Angeles and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the _____ judgment of the said District Court in this cause be, and hereby is REVERSED and REMANDED.

Filed and entered July 1, 1992

A TRUE COPY
CATHY A CATTERSON
CLERK OF COURT
ATTEST
AUGUST 7, 1992
by: /s/

APPENDIX E

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1985(3):

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the

laws, or equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Fourteenth Amendment:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

Supreme Court, U.S.
FILED
OCT 29 1992
OFFICE OF THE CLERK

(2) (2)

Nos. 92-560 and 92-628

In The

Supreme Court of the United States

October Term, 1992

COUNTY OF LOS ANGELES; CITY OF MANHATTAN BEACH; ROBERT PHILOBOSIAN; CAPITAL CITIES/ABC, INC.; WAYNE T. SATZ; CHILDREN'S INSTITUTE INTERNATIONAL AND KATHLEEN "KEE" MACFARLANE,

Petitioners,

vs.

PEGGY MCMARTIN BUCKEY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit's decision involves a ruling on the relationship between common law malicious prosecution and 42 U.S.C. § 1983?

2. Whether the Ninth Circuit's decision states that Respondent in fact has both substantive due process and equal protection claims?

3. Whether parties who had no privity to a prior criminal proceeding have standing to assert it as a basis for a collateral estoppel defense in a subsequent civil suit?

PARTIES TO PROCEEDINGS

Two separate petitions for Certiorari were filed, No. 92-560 by Petitioners COUNTY OF LOS ANGELES, CITY OF MANHATTAN BEACH and ROBERT PHILOBOSIAN; and No. 92-628 by CAPITAL CITIES/ABC, INC., WAYNE T. SATZ, CHILDRENS INSTITUTE INTERNATIONAL and KATHLEEN "KEE" MACFARLANE. Plaintiff PEGGY MCMARTIN BUCKEY responds to both petitions herein.

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RESTATEMENT OF THE CASE

The Complaint in this action was filed by Respondent PEGGY MCMARTIN BUCKEY in the U.S. District Court, Central District of California on January 19, 1990, following one of the most notorious and longest criminal preliminary hearings in history.

The federal claim alleged in the first count arose under 42 U.S.C. § 1983 for breach of civil rights, and the remaining counts were pendent state law claims for common law conspiracy, defamation and malicious prosecution against some or all Petitioners COUNTY OF LOS ANGELES, CITY OF MANHATTAN BEACH, former Los Angeles County District Attorney ROBERT PHILOBOSIAN ("PHILOBOSIAN"), CHILDREN'S INSTITUTE INTERNATIONAL ("CII"), KATHLEEN "KEE" MACFARLANE ("MACFARLANE"), CAPITAL CITIES/ABC, INC. ("ABC"), AND WAYNE T. SATZ ("SATZ").

In substance, the complaint alleged a loose-knit conspiracy among the public and private party defendants to investigate, prosecute and convict BUCKEY on charges she molested numerous children at the Virginia McMartin Preschool she co-owned with her mother, in violation of BUCKEY's rights under state and federal constitutions and laws for the mutual advantage of Petitioners, **e.g.** PHILOBOSIAN, an appointed District Attorney who needed an election issue; CII employee MACFARLANE, the child abuse interviewer for the public entities and SATZ, an ABC reporter who "broke" the story on the McMartin Preschool, who had an ongoing secret romance with MACFARLANE which was not disclosed until late in the proceedings.

On August 6, 1990 Petitioners (except SATZ) moved to dismiss the complaint and the District Court granted the motion without leave to amend on September 28, 1990. SATZ appeared later and joined the appeal by stipulation. On appeal in the Ninth Circuit, the trial court was overruled and Respondent was granted leave to amend her complaint to allege an equal protection claim.

On March 4, 1992 Petitioners filed for a rehearing or rehearing en banc with the Ninth Circuit which was denied on July 1, 1992, and at that time the Ninth Circuit amended its prior decision solely to note that the decision did not preclude any immunity claims.

SUMMARY OF ARGUMENT

The two Petitions for Certiorari responded to here contain fundamental analytical errors which should preclude granting the Petitions. First, they virtually ignore the precise holding of the 9th Circuit for which review is sought, that Petitioner should have at least one opportunity to amend her civil rights complaint to attempt to state a federal claim based upon existing allegations of outrageous concerted abuses by public and private parties which, if true, look like a nascent claim under the 14th Amendment not yet adequately pleaded. *Leave to amend once is all that was decided below.*

Second, Petitioners ignore the significant facts which distinguish this case from all others cited by Petitioners to support their position. The complaint is not in any sense limited to what Petitioners did to Respondent *prior* to the probable cause finding at her preliminary hearing.

For example, she pleaded that the conspiracy continued *after* she was bound over for trial, such as through a trumped-up publicity campaign, and the fact that *after* leaving office, PHILIBOSIAN continued to support the conspiracy in a defamatory press conference. (Complaint, ¶¶ 24, 26 and 38)

RESPONDENT'S ARGUMENTS FOR DENYING THE PETITION

I. THE ISSUES RAISED BY PETITIONERS CITY, COUNTY AND PHILOBOSIAN WERE NOT EXPRESSLY RULED ON BY THE NINTH CIRCUIT AND ARE NOT NECESSARY TO THE RESULT REACHED BELOW

The public Petitioners base their claim for review solely on the argument that the Ninth Circuit in *Buckey* upheld common law, malicious prosecution as the basis for BUCKEY's § 1983 cause of action, and that the Circuits are supposedly split on whether such a basis for a § 1983 case exists. That is an unduly subtle and intuitive reading of the complaint (which has a separate pendent claim for malicious prosecution) and the opinion. Nowhere in the Ninth Circuit opinion does it state or imply that its basis is malicious prosecution. Its basis is rather a course of conspiratorial conduct amounting to a substantive due process violation. Moreover, the complaint clearly goes beyond the elements of malicious prosecution: (1) lack of probable cause, (2) malice and (3) favorable termination. In the *Buckey* case, the "violation" is what went on before, during, after and even outside the scope of the prosecution. If BUCKEY's § 1983 theory

is correct, she would have a civil rights claim even if she had been convicted, akin to a prisoner's claim that he was beaten in jail which is not barred because there was probable cause to arrest or prosecute.

The public Petitioners' position is also somewhat deceptive in its reliance on state and federal precedents to support their malicious prosecution argument. For example, they cite *Guenther v. Holmgreen*, 738 F.2d 879 (7th Cir. 1984), **cert. denied**, 469 U.S. 1212 (1985), to support the proposition that a probable cause finding at a preliminary hearing precludes subsequent relitigation of that issue, but omit the later opinion from the same court which makes it clear that supposed rule does not apply in a case like BUCKEY'S with quite different and specific allegations.

> "We agree with the district court that the preliminary hearing determination does not preclude relitigation of the probable cause issue. The preliminary hearing concerned the sufficiency of the evidence to establish probable cause. Since the instant claim is more accurately characterized as a challenge to the integrity of the evidence than to its sufficiency, identity of the issues is lacking. . . . In this case Schertz does not claim that the defendants concealed or misrepresented facts actually known to them; therefore, the existence of probable cause bars plaintiff's § 1983 claim." *Schertz v. Waupaca County*, 875 F.2d 578, 581-582 (7th Cir. 1989)

Here, of course, BUCKEY makes precisely the claims that Schertz failed to make, and the prior probable cause finding does not bar her case. It also might be noted that

California law on the collateral estoppel of criminal probable cause on malicious prosection is entirely consistent with this result, starting with *Jaffe v. Stone*, 18 Cal.2d 146 (1941), continuing through with *McGowan v. City of San Diego*, 208 Cal.App.3d 890, 895 (1989), *Sheldon Appel Co. v. Albert & Oliker*, 47 Cal.3d 863, 877 (1989) and most recently *Cook v. Farmers Group, Inc.*, 1 Cal.App.4th 163, 167 (1992).

II. SUPREME COURT REVIEW OF THIS CASE IS UNNECESSARY BECAUSE THE 'PRIVATE' PETITIONERS HAVE MISCONSTRUED THE NINTH CIRCUIT OPINION REGARDING DUE PROCESS AND EQUAL PROTECTION

The Ninth Circuit panel made no evaluation as to the validity of Respondent's equal protection or due process claim, and explicitly stated, "The only issue we confront is whether we should remand to permit Buckey to amend her pleadings." *Buckey v. County of Los Angeles*, 957 F.2d 652, 654 (9th Cir. 1992). The court concluded only that under existing federal law, an amendment of the pleadings was permissible. The court specifically noted no opinion was offered as to whether such a claim could ethically and professionally be filed, only indicating that such a claim was a possibility. *Id.* In fact, the court states the focus of the claim would not be due process violations, but rather equal protection claims, because the procedural remedies which absolved Respondent of criminal liability were made necessary "only because of a wrongful conspiracy of entities and persons acting under the color of state law." *Id.* at 655.

Despite Petitioners' claims to the contrary, liability for these private entities may exist under an equal protection claim where these parties had acted as agents of the state. "Liability must be established by showing that the defendants either personally participated in a deprivation of the plaintiff's rights or caused such a deprivation to occur." [citations omitted] *Bouvia v. County of Los Angeles*, 195 Cal.App.3d 1075, 1087 (1987). The liability of a private party under § 1983 may exist for acting "in concert with" a government, even when the government is immune, **See** *Dennis v. Sparks*, 449 U.S. 24, 27-29 (1980); or if the private parties willfully participate in government denial of constitutional rights. *Arnold v. IBM*, 537 F.2d 1350 (9th Cir. 1981). Private parties can be held to have "conspired" with the state and therefore be subject to § 1983 liability, if the government failed to exercise independent judgment. **See** *Gramemos v. Jewel Companies, Inc.*, 797 F.2d 432, 435-436 (7th Cir. 1986), **cert. denied**, 1075 S.Ct. 1952 (1987).

As stated above, the state delegated its investigatorial duties to CII and MACFARLANE. Consequently, CII and MACFARLANE became state actors whose endeavors have created equal protection liability for themselves as well as the state. Ironically, the McMartin Preschool case has become the national model for how *not* to conduct a child sexual abuse investigation. **See** ABA Journal, July, 1992 at p.36.

Additionally, SATZ and ABC were willing and active participants in the conspiracy and assisted in the deprivation of Respondent's rights by knowingly broadcasting false information to boost news program ratings and to promote the individual careers of both SATZ and his

clandestine paramour MACFARLANE. (Complaint ¶¶ 26 and 29)

III. COLLATERAL ESTOPPEL CANNOT BE ASSERTED BECAUSE THE 'PRIVATE' PARTIES LACK STANDING TO DO SO

To argue collateral estoppel in a civil proceeding, regarding issues determined at a prior criminal proceeding, the prior action must have involved the same parties or their privies. *McGowan v. City of San Diego*, 208 Cal.App.3d 890 (1989). Since ABC and SATZ were not parties to the criminal proceeding, they lack standing to assert collateral estoppel in this civil matter.

Moreover, CII and MACFARLANE cannot have it both ways. If they are independent private actors, they are precluded for lack of standing from asserting collateral estoppel. But if CII and MACFARLANE are parties to the criminal proceeding (and therefore state actors) for purposes of collateral estoppel, then they must also be state actors for purposes of equal protection. Moreover, if parties were permitted to argue collateral estoppel in civil proceedings regarding all issues surrounding a criminal prosecution, then virtually any claim for malicious prosecution would be precluded.

IV. CONCLUSION

The Petitioners are wide of the mark for review by this Court. Indeed, the Petitioners make much ado about not very much. All that Mrs. BUCKEY achieved after great effort and expense, was leave to amend. There is no

far reaching precedent here. Respondent deserves the opportunity to replead her claims against the powers that be who destroyed her entire world.

October 28, 1992

Respectfully submitted,

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APPENDIX

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PEGGY MCMARTIN BUCKEY

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

PEGGY MCMARTIN BUCKEY,

Plaintiff,

vs.

COUNTY OF LOS ANGELES; CITY OF MANHATTAN BEACH; ROBERT PHILOBOSIAN; CHILDREN'S INSTITUTE INTERNATIONAL; KATHLEEN "KEE" MACFARLANE; CAPITAL CITIES/ABC, INC.; and WAYNE T. SATZ;

Defendants.

_____/

CIV. No. 90 0293 RG(GHKX)

COMPLAINT FOR DAMAGES FOR VIOLATION OF CIVIL RIGHTS AND OTHER CLAIMS

(Filed Jan. 19, 1990)

JURY TRIAL DEMANDED

Plaintiff alleges:

I. JURISDICTION AND VENUE

1. This action arises under the Federal Civil Rights Act of 1871, 42 U.S.C. Section 1983, and the principles of

pendent jurisdiction. This court has jurisdiction pursuant to 28 U.S.C. Sections 1331, 1332 and 1343.

2. Plaintiff is a California citizen residing in this district, and venue is proper in this District because each of the public entity defendants is located entirely within this District; plaintiff is informed and believes that each of the individual defendants is and was at all times here relevant a resident of this District; and substantially all of the events alleged below occurred within this district. Defendant CAPITAL CITIES/ABC, INC. is a foreign corporation which is incorporated in and has its principal place of business in a state other than California, but is doing business in this district as "ABC Television."

3. The amount in controversy exceeds $50,000.00

II. PRELIMINARY ALLEGATIONS COMMON TO ALL COUNTS

4. Plaintiff was until the events herein alleged began in 1983 the co-owner of and a teacher at the Virginia McMartin Preschool ("Preschool") in Manhattan Beach, California. The Preschool and plaintiff enjoyed unblemished reputations and prestige for providing education and care for preschool aged children, and were duly licensed to do so.

5. Plaintiff is informed and believes that at some time in 1983, Judy Johnson ("Johnson"), a parent of a former Preschool student, told the Police Department of defendant CITY OF MANHATTAN BEACH ("CITY") that her son had been sexually molested at the Perschool at some unspecified time in the past. Plaintiff is informed and

believes that the police department had received prior complaints from the same parent which had turned out to be false and fabricated, and that they further knew that Johnson recently had been released from a mental health institution where she had been confined for paranoia and other mental and emotional infirmities, but the police nonetheless began a purported child abuse investigation without any attempt to inform the Preschool or the teaches of the allegations against them. The initial efforts of the police in this regard included sending a letter to parents of all Preschool children advising them that their children might have been molested at the Preschool, which caused panic and dismay among the parents and substantial injuries to the reputation of plaintiff and the Preschool by the reckless implications of misconduct.

6. At some point after CITY's purported child abuse investigation began, but prior to the indictments identified below, CITY received the active assistance of Defendant COUNTY OF LOS ANGELES ("COUNTY"), a political subdivision of the State of California, through COUNTY's Sheriff's Department and District Attorney's Office, who like CITY did not conduct their own or an independent investigation of the allegations of child abuse.

7. Plaintiff is further informed and believes that at the suggestion of COUNTY, CITY retained defendant CHILDREN'S INSTITUTE INTERNATIONAL ("CII"), formerly Big Sisters' League, to interview, examine, interrogate and evaluate the alleged victims of child abuse, and report initially to CITY, and later after criminal proceedings had been initiated, to COUNTY, whether child abuse had occurred and who the perpetrators were. Plaintiff is

informed and believes that CII in turn, by and through its duly authorized officers and agents, delegated the aforesaid tasks to its officials Astrid Heger ("Heger") and Bruce Woodling ("Woodling"), who in turn delegated actual work with children to defendant KATHLEEN "KEE" MACFARLANE ("MACFARLANE"), and others not now specifically known to plaintiff.

8. Plaintiff is informed and believes that CII is a California non-profit corporation which holds itself out to the public as an independent, professional and objective organization that is expert at the task of assessing whether in fact child abuse has occurred, the nature thereof and the identity of the perpetrators, as well as conducting treatment and therapy. Plaintiff is further informed and believes that the employees of COUNTY and CITY responsible respectively for recommending and retaining CII were not adequately trained or supervised: (1) to determine whether such a reference was necessary or desirable, (2) to determine the qualifications of CII or its agents and employees to perform the duties delegated to them, or (3) to evaluate the information produced by CII. The delegation of substantially all investigatory duties to CII and failure to supervise CII by CITY and later COUNTY was in violation of published manuals and procedures which were in accordance with mandatory State of California policy for such investigations under Penal Code Sections 13823.5 and 11166 *et seq.*, as in effect at the time, adopted for their direction and control by the relevant state authorities and constituting a rule of law as defined in Government Code Section 811.6. On the other hand, the manner of over-delegation and failure to supervise CII were pursuant to governmental policies of CITY

and later COUNTY to pursue this child abuse investigation in a manner which disregarded some state policies and plaintiff's rights, for example on confidentiality, for the political benefit of CITY, COUNTY and their officials (especially defendant ROBERT PHILOBOSIAN, who was running for election as District Attorney at the time, having been previously appointed to that post) through favorable publicity and media attention, while at the same time purporting to act pursuant to state law.

9. Subsequent to the attempted performance of its delegated task, but before the indictments identified below, CII reported to CITY and COUNTY its conclusions that numerous acts of child abuse had occurred at the Preschool, and that plaintiff, among others, was a perpetrator or probable perpetrator thereof, although CII had no contact with plaintiff nor specific knowledge about plaintiff at the time such report was made; and, CII had violated substantially all standards for interviewing alleged child abuse victims, including without limitation, unduly leading interrogation, coaching of statements, and intimidating children into making false and fantasized charges against plaintiff. Plaintiff is further informed and believes that CII and its agents and employees, including without limitation MACFARLANE, engaged in such improper activities because it was to their economic, personal and professional advantage to produce reports leading to indictments of plaintiff and others, as well as favorable publicity about themselves. Plaintiff is further informed and believes that CII was on the verge of closing its operations because of its financial instability at the time the Preschool investigation was delegated to it,

which motivated CII to "uncover" non-existent child abuse in order to perpetuate itself.

10. Plaintiff is informed and believes that some time in 1984, after CII's reports to CITY and COUNTY, defendant ROBERT PHILOBOSIAN ("PHILOBOSIAN"), the duly appointed and acting District Attorney of Los Angeles County and a candidate for election to that office, decided to present to the Grand Jury the name of plaintiff, among others, for indictment for the alleged child abuse at Preschool. Plaintiff is further informed and believes that PHILOBOSIAN based his decision upon the recommendations of CITY, the reports of CII, and MACFARLANE and the advice of agents and employees of CITY and COUNTY (none of whom had in fact conducted an actual or independent investigation of the alleged child abuse), and on his assessment of the value of the publicity attendant to an indictment under the circumstances present for his ongoing political campaign.

11. Subsequently in 1984, the Grand Jury indicted plaintiff and others on numerous counts of child abuse and related offenses in connection with the Preschool, based upon facts selected for presentation to the Grand Jury by PHILOBOSIAN and those acting under his direction and control, and after the suppression and mishandling of evidence that he, CITY and COUNTY knew then would have been exculpatory of plaintiff, including without limitation, the truth with respect to the initial complaining witness described above in paragraph 5.

12. Thereafter, plaintiff was subjected to arrest and booking procedures, as well as further purported investigation throughout the period 1984 to 1986, re-arrest, and

all amid tremendous amounts of publicity, official statements and pronouncements about plaintiff's guilt for child molestations, which were generated by CITY, COUNTY, PHILOBOSIAN, CII and others acting in concert with them and which continued unabated throughout the criminal proceedings against plaintiff up to 1990.

13. Plaintiff was subjected to additional pre-trial proceedings and eighteen (18) months of preliminary hearings which terminated in 1986, but did not have the opportunity therein to litigate the issues raised in this complaint because of the acts of defendants in concealing evidence of their own misconduct as alleged herein, which included fabricating evidence against plaintiff and suppressing evidence in her favor.

14. At the conclusion of the preliminary hearing, plaintiff was bound over for trial and did not at that time know the nature of the misconduct of defendants in fabricating evidence, suppressing evidence and suborning perjury against her, although she maintained her innocence of the charges.

15. Each defendant is believed to have been the agent of each of the other defendants and acting within the course and scope of such agency with respect to the matters herein alleged, except where the contrary is specifically pleaded.

16. Within 100 days after her acquittal and the dismissal of the criminal charges against plaintiff, plaintiff filed claims with COUNTY and CITY alleging essentially the same facts as alleged throughout this complaint, claiming continuing tortious conduct by COUNTY and CITY from 1983 through 1990, under the California Tort Claims Act,

Government Code Sections 911 et seq., and those claims have been rejected or will be rejected or deemed rejected.

17. Plaintiff was disabled from filing an earlier claim by the circumstances of the criminal prosecution, the publicity, the damages suffered and the combined acts of defendants to prevent plaintiff from ascertaining the truth about such defendants' conduct and being able to take action thereon at least up until the conclusion of the criminal case against her, under a totality of circumstances which would have in any event rendered any additional claim filing an idle act, and prevented plaintiff's adequate knowledge of the claim. Plaintiff further alleges that any impediment to this action based on alleged failure to comply with government claims presentation requirements is invalid on the ground that such procedures as applied deny plaintiff equal protection of the laws and due process, especially under the 5th Amendment to the United States Constitution's prohibition against requiring a criminal defendant to engage in self-incrimination.

III. FIRST COUNT VIOLATION OF CIVIL RIGHTS UNDER 42 U.S.C. 1983

18. Paragraphs 1 through 17 above are incorporated in this paragraph by this reference; and plaintiff alleges as follows against each of the defendants.

19. This cause of action arises under 42 U.S.C. Section 1983, and seeks to hold defendants, who, plaintiff is informed and believes, at all times here relevant were persons acting under color of state law or in concert with persons acting under color of state law, responsible for

their deprivation of plaintiff's rights, privileges and immunities secured by the statutes and Constitution of the United States. Defendants' acts were either for the intentional purpose of violating plaintiff's rights, or with deliberate indifference toward such rights, and were pursuant to governmental policies of CITY and COUNTY regarding handling child abuse cases in a manner which disregarded the rights of the putative defendant and maximized public exposure and publicity, especially as those policies were applied to plaintiff. The specific facts of the policy upon which this cause of action is based were not discovered until within one year preceding the filing of this action, and could not have been earlier discovered despite reasonable diligence because of defendants' acts oppressing plaintiff and suppressing evidence of their own misconduct.

20. Plaintiff is informed and believes that the specific misconduct of defendants CITY, COUNTY and PHILOBOSIAN at issue, joined in by the other defendants, includes without limitation, the following which occurred and injured plaintiff continuously at virtually certain that such injuries would occur:

(1) failure to adequately train and supervise employees and delegatees, including CTIY's Police Department and MACFARLANE (who had no relevant academic, professional or technical license or credentials), with respect to child abuse and molestation investigations;

(2) issuing false and misleading statements to the news media regarding the progress of the investigation

and trial, and regarding the state of the supposed evidence against plaintiff for the purpose of enhancing defendants' public image and gaining unfair advantage over plaintiff at trial; and for similar purposes, causing information subject to court protective orders to be leaked to the media;

(3) attempting to intimidate plaintiff's co-defendants in the criminal proceeding so as to produce from them a false confession implicating plaintiff; *e.g.*, causing co-defendant Babette Spitler's children to be arrested, removed from the care of relatives and detained incommunicado as leverage for a plea bargain and testimony from Spitler implicating plaintiff;

(4) fabricating evidence against plaintiff, suppressing evidence in favor of plaintiff, and suborning perjury and/or perjury; and,

(5) interfering with plaintiff's ability to practice her profession as a teacher, and her ability to reestablish her business by publishing and re-publishing, for the purposes of such interference, to the general public and administrative licensing bodies within a year preceding the filing of this action, the allegations against plaintiff of child abuse which defendants knew to be false.

21. The rights, immunities and privileges of plaintiff violated by defendants and each of them include without limitation, the rights to privacy, due process, equal protection and a fair trial secured by the Fourth, Fifth and Fourteenth Amendments to the U.S. Constitution, as well as Article I, Section 7 of the California Constitution.

22. Plaintiff was injured in her rights and feelings, and lost employment and income by the aforesaid acts and omissions of duty by defendants and each of them, and was deprived of her preschool business for the same reason, incurring damages in an amount in excess of $1 million.

IV. SECOND COUNT COMMON LAW CONSPIRACY – AGAINST ALL DEFENDANTS

23. Paragraphs 1 through 17, and 19 through 22 above are incorporated in this paragraph by this reference, and plaintiff further alleges against all defendants on information and belief:

24. In late 1983 or early 1984, prior to any action taken by CITY or COUNTY with respect to initiation of a criminal prosecution of plaintiff, persons employed by CITY, COUNTY and CII, including MACFARLANE, and other individuals not so employed, believed to include CAPITAL CITIES/ABC, INC. reporter defendant WAYNE T. SATZ, entered into an informal agreement among themselves to conduct and publicize an investigation of allegations of child abuse at the McMartin Preschool in such a way as to predetermine the outcome of the investigation of those allegations and produce indictments of plaintiff and others, even though the defendants and others involved knew those allegations were false and that they would be depriving plaintiff of her civil rights such as the right to a fair trial. The defendants joined in and agreed to the conspiracy and its purposes as it proceeded and prior to indictment of plaintiff, including defendant PHILOBOSIAN, and each continued to actively participate

therein at least up until early 1986; each continued to passively support the conspiracy through failure to disclose its nature and existence and acceptance of the economic and professional benefits therefrom through 1990; and, CITY, COUNTY, CII and MACFARLANE actively participated in furthering the conspiracy at least up through 1990 to plaintiff's acquittal.

25. Each of the defendants named in this cause of action agreed, conspired and acted for the purpose of violating plaintiff's civil rights as set forth in the Constitution and laws of the United States and the State of California, including without limitation, the 4th, 5th and 14th Amendments to the U.S. Constitution, 42 U.S.C. Section 1983, and Article I, Section 7 of the California Constitution, and related laws which guaranteed plaintiff due process, equal protection and a fair trial on the criminal charges defendants caused to be filed against her. Each defendant participated in the conspiracy for personal, professional, economic or political gain and did so gain from plaintiff's injuries.

26. The specific misconduct engaged in by each defendant in pursuit of the conspiracy included, without limitation, conspiring to and fabricating evidence against plaintiff, suppressing evidence favorable to plaintiff, suborning perjury and/or committing perjury while testifying, and making knowingly false and misleading public statements and press releases so as to prejudice plaintiff and present her in a false light as a depraved person unfit to be near small children. In addition, each defendant agreed with each other defendant to conduct and they did jointly conduct the investigation into child abuse at Preschool and subsequent prosecution in a manner that

recklessly disregarded and had deliberate indifference toward the rights and feelings of plaintiff, by excessive publicity, overdelegation of authority and responsibility for the purported investigation and interviews of the child witnesses, lack of supervision of inadequately trained personnel, failure to follow established procedures for protection of the alleged victims and perpetrators, encouraging parents to make false or exaggerated claims of child abuse in exchange for promises of public funds for crime victims, and other means that made injury to plaintiff's rights virtually certain.

27. The agreement and overt acts of the defendants were not protected by privilege or immunity because they commenced prior to initiation of any prosecution, and included excessive publicity generated by false and misleading public announcements by each of the defendants throughout the investigation and prosecution, with the specific intent to hide defendants' own misconduct and to deprive plaintiff of the right to a fair trial and to resume her chosen profession.

28. The facts regarding the conspiracy alleged were discovered within one year preceding the filing of this action, and could not have been earlier discovered despite reasonable diligence because of the efforts and success of defendants in manipulating and controlling the information available to plaintiff and the public abut the evidence for and against plaintiff, as well as defendants' role with respect thereto.

29. The conspiracy described above injured plaintiff as alleged in paragraph 22. Plaintiff further alleges against defendants other than CITY and COUNTY that in doing

the acts described above, each defendant acted with malice in intending to cause plaintiff's injuries, and knew and observed the extent of her emotional and other injuries from their acts and omissions of duty; each defendant's conduct was despicable, particularly given their public and professional positions and duties; their acts were wilful and with a conscious disregard and indifference for plaintiff's rights and feelings, and subjected her to cruel and unjust hardship, pain, shock, nausea and humiliation, entitling her to exemplary damages according to proof for sake of example and by way of punishing each defendant other than CITY and COUNTY.

V. THIRD COUNT MALICIOUS PROSECUTION – AGAINST CAPITAL CITIES/ABC, INC., WAYNE T. SATZ, CII and KATHLEEN MACFARLANE

30. Paragraphs 1 through 17, and 24 through 26, are incorporated in this paragraph by this reference, and plaintiff alleges as follows against all defendants except CITY OF MANHATTAN BEACH, COUNTY OF LOS ANGELES and ROBERT PHILOBOSIAN:

31. Plaintiff is informed and believes that each defendant was instrumental in procuring the prosecution of plaintiff because each had the ability to control the flow of information regarding the investigation to the public, the press, the police, the prosecutors, the grand jury and the courts and each was familiar with the facts regarding plaintiff's innocence, the falsity of the allegations against her, and the methods used to obtain incriminating statements from the alleged victims of child abuse. Each defendant actively assisted in presenting or suppressing

such information by either committing perjury, suborning perjury, fabricating information, hiding it, selectively leaking it to the press or publicizing it so as to produce an indictment and trial of plaintiff for child molestation, even though each defendant knew that there was in fact no probable cause to believe defendant guilty of such charges and had no honest or reasonable good faith belief in the existence of probable cause.

32. Each defendant acted maliciously out of motives of personal, professional and/or economic gain, as appropriate to whether it was an individual or an organization, at the expense of plaintiff's injuries and with the knowledge and intent that plaintiff would be injured in her reputation, feelings and economic welfare. Further, defendants CII and CAPITAL CITIES/ABC, INC. knew or should have known of each of the wrongful activities of their respective employees, KATHLEEN "KEE" MACFARLANE and WAYNE T. SATZ as herein alleged, but failed to take any action to prevent or restrain them from causing harm to plaintiff, accepted economic benefits from their activities as described herein, and by action and inaction ratified and approved their wrongful conduct.

33. Notwithstanding the prosecution maliciously procured by defendants, the criminal proceedings were terminated in plaintiff's favor in early 1990 by acquittal of all charges.

34. As a result of such malicious prosecution, plaintiff has suffered anguish, anger, shock, public disgrace and humiliation, loss of employment and income and incurred attorney's fees and court costs in an amount in

excess of $1 million. In addition, plaintiff seeks exemplary damages for each defendant's malicious, intentional, deliberate, wilful and despicable disregard of her rights and feelings, for sake of example and by way of punishing defendants.

VI. FOURTH COUNT DEFAMATION - AGAINST ALL DEFENDANTS

35. Paragraphs 1 through 17, 24 and 26 are incorporated in this paragraph by this reference, and plaintiff alleges as follows against all defendants as follows:

36. This action is not barred by Civil Code Section 48.7a because the prosecution of plaintiff for child abuse terminated before this action was filed; nor, because of that section could this action have been filed prior to dismissal of such charges. This action is not barred by the provisions of Penal Code Section 11166 et seq. with respect to any defendant connected with CII or claiming an immunity based on agency or employment by CII because the actions alleged herein were not reports of child abuse but investigative and other non-reporting activities. In addition, in 1986, CII through a spokesperson publically denied on a nationwide television broadcast that its activities challenged herein had been conducted pursuant to or for the purposes of producing a report protected under that [sic] those statutes; and further, the allegations herein include publication of the information which those statutes are designed to keep confidential.

37. Plaintiff is informed and believes that each of the defendants joined in and republished to numerous persons in this county each of the defamatory statements herein alleged, as well as others not now specifically known to plaintiff, and continued to do so from some time in 1983 or 1984 prior to the bringing of the criminal charges of alleged child abuse against plaintiff, up to and including times after the criminal charges were formally dismissed against plaintiff in 1990. Plaintiff is informed and believes that such false and defamatory statements were made or joined in both within the course and scope of each individual defendant's employment and outside such course and scope, for example, in connection with administrative proceedings concerning plaintiff's professional credentials after termination of the criminal proceedings. Plaintiff is further informed and believes that defendant PHILOBOSIAN made such statements both within and outside the scope of his office as District Attorney and made some such statements purely for personal, professional and political advantage in 1986 after he had left that office.

38. Plaintiff is informed and believes that the defamatory statements alleged consisted of both written and oral statements from each of the defendants which stated in essence that plaintiff had been involved in illegal sexual activity with numerous small children at Preschool for an extended period of time, was involved in child abuse, child molestation, and child pornography, and violated sections of the Penal Code forbidding such activities; that plaintiff had committed various sexual assaults on children, threatened and intimidated them; participated in Satanic rituals with children, mutilated dead and live

animals; and committed other disgusting and repulsive sexual acts. Plaintiff is informed and believes that each defendant falsely stated to the public that numerous children had specifically identified plaintiff as a perpetrator of the foregoing offenses, including statements by defendants CAPITAL CITIES/ABC, INC. and/or WAYNE T. SATZ on multiple, sometimes daily, nationwide media broadcasts from 1984-1990. Plaintiff is informed and believes that defendant CAPITAL CITIES/ABC, INC. has possession and control of copies of each such defamatory broadcast by itself and WAYNE T. SATZ. Each of the defendants either directly participated in, or assisted others in preparing for or setting up and choreographing interviews and interrogations of alleged victims or witnesses and others who were deliberately questioned in such a way as to expressly or impliedly accuse plaintiff of involvement in heinous sexual conduct related to children, even though the actual interrogators and the other assisting defendants knew such allegations were the false and fabricated product of the interrogation methods.

39. The publications were made in this county, of and concerning plaintiff and were so understood by those who heard and read them from 1983 to 1990, including plaintiff's friends, neighbors and professional colleagues, and parents of students who attended the Preschool.

40. All of the publications, accusations and innuendo were false, and false as they pertained to plaintiff, as to whom the truth known to defendants was that she was a competent and caring professional who have never harmed or threatened to harm a child. Plaintiff took all reasonable steps within her ability to counteract such defamatory statements, including public demands for

retraction, withdrawal and correction which are herewith reasserted and have previously been asserted in writing, and any further requirement for mitigation is excused by the circumstances attending the extended criminal prosecution of plaintiff and defendants' oppressive conduct toward her.

41. The acts of each defendant caused plaintiff a loss of reputation, shame, mortification and shock, and required her to expend funds to retain attorneys to defend and advise her with regard to her rights, all such damages in an amount in excess of this court's jurisdictional minimum. Plaintiff also seeks special damages against defendants because their acts were specifically intended to cause and did cause the temporary or permanent destruction of plaintiff's ability to carry out her business or profession; caused loss of employment and income for the years 1983 through 1990 and continuing in an amount in excess of this court's jurisdictional minimum.

42. The publications by defendants from 1983 or 1984 through 1990 were malicious and made from ill-will toward plaintiff, with a conscious disregard for plaintiff's rights and feelings so as to capitalize at plaintiff's expense and for defendants' personal, political, professional and economic benefit on the public sentiment against child abusers and to satisfy defendants' selfish desires for notoriety and fame. Plaintiff therefore seeks punitive damages against defendants other than COUNTY for sake of example and by way of punishing each of such defendants.

PRAYER

THEREFORE, Plaintiff prays for judgment against Defendants and each of them as follows:

1. General damages of $1 million and according to proof on the First, Second, Third and Fourth Counts;

2. Attorneys' fees on the First and Third Counts according to proof;

3. Special damages according to proof on the Fourth count;

4. Prejudgment interest on damages as allowed by law;

5. Such other and further relief as the court deems proper.

Dated: January 19, 1990

JAMES H. DAVIS
A Law Corporation
By _____
JAMES A. QUINN
Attorneys for Plaintiff
PEGGY MCMARTIN BUCKEY

JURY TRIAL DEMAND

Plaintiff hereby demands a trial by jury pursuant to Fed. Rules Civ. Pro., Rule 38(b).

Dated: January 19, 1990

JAMES H. DAVIS
A Law Corporation
By _____
JAMES A. QUINN
Attorneys for Plaintiff